

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 410 of 2004****For Approval and Signature:****HONOURABLE MR.JUSTICE A.M.KAPADIA****THE HON'BLE SMT. JUSTICE ABHILASHA KUMARI**

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Whether Reporters of Local Papers
1 may be allowed to see the
judgment ?
2 To be referred to the Reporter or
not ?
3 Whether their Lordships wish to see
the fair copy of the judgment ?
Whether this case involves a
substantial question of law as to
4 the interpretation of the
constitution of India, 1950 or any
order made thereunder ?
5 Whether it is to be circulated to
the civil judge ?

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STATE OF GUJARAT - Appellant(s)

Versus

KAILASHCHANDRA JAGANNATH SHARMA - Opponent(s)

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Appearance :

MS. HANSA PUNANI, APP for Appellant(s) : 1,

MR. NIRAJ VASU for Respondent(s) : 1,

=====

CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

**THE HON'BLE SMT. JUSTICE ABHILASHA
KUMARI**

Date : 20/03/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.M.KAPADIA)

- 1.The acquittal of the respondent ("the accused" for short) of the offences punishable u/s 161 of the Indian Penal Code ("IPC" for short) and u/s 5(1)(d) read with sec. 5(2) of Prevention of Corruption Act ("the Act" for short), recorded by the learned Additional Sessions Judge (Fast Track Court), District Kachchh at Gandhidham vide judgement and order dated 30.10.2003 rendered in Special Case No. (ACB) 6 of 1999 is subject matter of challenge in instant appeal which is filed u/s 378 of the Code of Criminal Procedure ("the Code" for short) by the Appellant - State of Gujarat.
- 2.The prosecution case as disclosed in the FIR and unfolded during trial is as under:
 - 2.1 Kailashchandra Jagannath Sharma, the accused, who was a medical officer in the dispensary managed by Jilla Panchayat of village Fategadh, Taluka Rapar, District Kachchh, is alleged to have in his capacity as a public servant demanded and accepted illegal gratification (bribe), other than the legal

remuneration, to which he was not entitled to, a sum of Rs.5/- for giving Government medicine namely Gerramycin from the bogus complainant - PW1 Premabhai Pethabbai. This was found in a decoy trap arranged by PW-4, Ranvirsingh Vadansingh Puvar, Police Inspector (ACB), Bhuj and on the basis of the said trap, a complaint is filed against the accused. Therefore accused, who was a public servant, stood his trial for the offences punishable u/s 161 of IPC and u/s 5(1)(d) read with Section 5(2) of the Act.

2.2 PW-4, Ranvirsingh Vadansingh Puvar, PI (ACB) had received secret information on 29.10.1985 that Kailashchandra Jagannath Sharma, a Medical Officer of a dispensary run by Jilla Panchayat Fatehgadh, Taluka Rapar, Dist. Kachchh was examining the patients at his residence and dispensary and used to recover fees by way of illegal gratification (bribe) for giving government medicines. On the basis of the said information PW-4 Ranvirsingh Vadansingh Purvar, PI arranged a decoy trap. First of all he called two independent persons to act as Panchas from Jilla Panchayat, Irrigation Government Quarter. Two panchas namely; Sukhlal Hemabhai Rathod and Ramjibhai

Patel were called in his office. He informed them about the secret information received by him. He, thereafter, contacted PW-1 Premabhai Pethabhai to act as a punter. Thereafter two panchas and a punter were introduced with each other. PW-1 Premabhai Pethabhai produced two currency notes of Rs.2/- denomination and one currency note of Re.1/- denomination, in all Rs.5/-, which was to be paid as illegal gratification (bribe) on demand being made by the accused. Thereafter, usual experiment of ultraviolet lamp was carried out on the said currency notes which were smeared with anthracene powder, in the presence of the punter and the panch witness. After the experiment was over, the said currency notes were kept in the pocket of the shirt of the Punter with instructions that unless it is demanded by the accused, he should not touch the currency notes and that is how first part of the panchnama was prepared. Thereafter, the punter, with his sister Shantaben, who was ailing, in the company of panch no. 1, went to the house of the accused for treatment. After giving injection to Shantaben, the accused gave two tablets and Gerramycin injection and also wrote prescription for the medicines which were

to be purchased from the market. As per the further prosecution case, the accused thereafter demanded Rs.5/-. On acceptance of amount of Rs.5/- by the accused, PW-1 gave signal to the member of the raiding party. They, therefore, immediately rushed to the residence of the accused. PW-4 Ranvirsingh Vadansingh Purvar introduced himself and the accused was asked to sit in the same position. On being asked, the accused gave his name as Kailashchandra Jagannath Sharma and thereafter two currency notes of Rs.2/- denomination and one currency note of Re.1/- denomination were recovered from the accused and again on usual experiment being made on the said currency notes, with the help of ultraviolet lamp, mark of anthracene powder was found on the said currency notes, which were the same currency notes which were supplied by the punter and the numbers of the said currency notes were noted in the first part of the panchnama and accordingly alleged trap was completed.

2.3 On completion of the trap, PW-4 Ranvirsingh Vadansingh Purvar filed a complaint against the accused which is registered against the accused for commission of the offences punishable u/s 161 of IPC and u/s 5(1)(d) read

with sec. 5(2) of the Act in ACB Police Station, Bhuj.

2.4 Pursuant to the registration of the complaint, the investigation was put into motion. During the course of the investigation further statement of the punter as well as panchas were recorded and thereafter sanction was obtained from the Deputy Secretary, Irrigation Department, Government of Gujarat, to prosecute the accused for commission of the offences punishable u/s 161 of IPC and u/s 5(1)(d) read with sec. 5(2) of the Act.

2.5 At the end of the investigation, as sufficient incriminating evidence was found against the accused, he was charge sheeted before the learned Special Judge, Kachchh at Bhuj for the offences punishable u/s 161 of IPC and u/s 5(1)(d) read with sec. 5(2) of the Act.

2.6 The learned Additional Sessions Judge, to whom the case was made over for trial, framed necessary charge against the accused. The charge was read over and explained to the accused. The accused pleaded not guilty to the charge and claimed to be tried. Thereupon he was put to trial and tried by the learned Additional Sessions Judge in Special Case (ACB)

No. 6 of 1999.

2.7 To prove the culpability of the accused, prosecution has examined the following witnesses and relied upon their oral testimony:

PW-1 Premabhai Pethabhai, Punter at Exh. 21

PW-2 Vinodbhai Valjibhai, Officer of Jilla Panchayat, Gujarat at Exh. 28.

PW-3 Sukhlal Hemabhai Rathod, Panch no.1 at Exh.33.

PW-4 Ranvirsingh Vadansingh Puvar, Complainant at Exh. 37.

2.8 To prove the case against the accused, prosecution has also produced sanction letter, complaint and panchnama of the receipts recovered from the accused and relied upon the contents thereof.

2.9 After recording of evidence of the prosecution witnesses was over, the learned Additional Sessions Judge explained to the accused, the circumstances appearing against him in the deposition of the witnesses. Thereafter, further statement of the accused was recorded u/s 313 of the Code. In his further statement also, he denied the prosecution case, however, he did not lead any evidence nor examine himself on oath.

2.10 On appreciation, evaluation, analysis and

scrutiny of the evidence on record, the learned trial Judge came to the conclusion that the evidence adduced by the prosecution is unreliable and not trustworthy and the investigating officer has also not followed the mandatory provisions contained under the Act. It was also held that the accused has never demanded any amount from the punter by way of illegal gratification. Investigating officer had recovered the amount of Rs.5/- for supplying the Gerramycin injection, which was not available in the dispensary. It was also held that the sanctioning officer has not applied his mind properly, before according sanction, as there was a circular of the Health Department to the effect that, when the Government is not supplying the medicines to the Primary Health Centers, then the concerned Doctor can supply the same and recover the charges for the same. In the instant case, there is an admission of the punter that he had paid Rs.5/- for supplying the Gerramycin injection, which was not available in the government dispensary and receipt thereof was also issued by the accused. On the aforesaid finding, the learned trial Judge has held that the guilt of the accused is not established.

He, therefore, acquitted the accused of the offence with which he was charged, giving rise to the instant appeal filed by the Appellant – State of Gujarat.

3.We have considered the submissions advanced by Ms. Hansa Punani, learned APP for the Appellant – State of Gujarat and Mr. Niraj Vasu, learned advocate for the respondent/original accused at length and in great detail. We have also perused the impugned judgement and order and the set of evidence, copies whereof have been supplied by Mr. Niraj Vasu, learned advocate of the accused during the course of his submissions. We have also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

4.The case against the accused was for demanding and accepting illegal gratification, to which he was not entitled in his capacity as a public servant, in discharge of his public duties. The ingredients of charge under Section 161 of the IPC and Section 5 (2) of the Act may be briefly stated as follows:

- (i) That the accused was a public servant;
- (ii) That he must be shown to have obtained from any person any gratification;

(iii) The gratification should be other than legal remuneration as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show in exercise of his official function favour of disfavour to the person.

5. When the first two ingredients are proved by the evidence, a rebuttable presumption arises in respect of the third ingredient and in absence of proof of first two facts, the presumption does not arise. On mere recovery of certain money from the person of the accused without proof of payment or on behalf of such person to whom official favour was to be shown, the presumption cannot arise (See Sita Ram v. State of Rajasthan, AIR 1975 SC 1432).

6. It must also be remembered that Section 161 of IPC does not require that the public servant must, in fact, be in a position to do the official act, favour or service at the time of the demand or receipt of the gratification. To constitute an offence under this section, it is enough if the public servant who accepts the gratification, takes it by inducing a belief or by holding out that he would render assistance to the giver 'with any other public servant' and the giver gives the gratification under that belief. It is further immaterial if the

public servant receiving the gratification does not intend to do the official act, favour or forbearance which he holds himself out as capable of doing (See Chaturdas Bhagwandas Patel v. State of Gujarat, AIR 1976 SC 1497).

7. Another important test which must be remembered is that where the recovery of the money coupled with other circumstances leads to the conclusion that the accused received illegal gratification from some person, the Court would certainly be entitled to draw the presumption under Sec.4 (1) of the Act. Even under Section 114 of the Evidence Act, the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, in their relation to the facts of the particular case (See Hazarilal v. The State (Delhi Administration) AIR 1980 SC 973).
8. Where in a trap case, the Judge magnifies every minor detail or omission to falsify or throw even a shadow of doubt on the prosecution evidence, then it would be the very antithesis of a correct judicial approach to the evidence of witnesses in a trap case. Indeed, if such a harsh touchstone is prescribed to prove such a case, it will be difficult for the prosecution to establish any case at all (See State of

Maharashtra v. Narsingrao Gangaram Pimple, AIR 1984 SC 63.

9. Thus, the Court of Special Judge should invariably be aware of the correct judicial approach in a trap case and see that it does not enter into the exercise of magnifying minor details and omissions, only with a view to falsify witnesses and throw overboard, the prosecution case.
10. In the back drop of the aforesaid settled principles enunciated by the Supreme Court with regard to appreciation of evidence in a bribe case, we may now advert to the actual evidence on record to find out as to whether the prosecution has established its case against the accused, that in his capacity as public servant he demanded and accepted the amount of Rs.5/- from the punter for supplying the tablets and the Gerramycin injection to his ailing sister Shantaben.
11. In this connection, first of all, we may notice the oral testimony of PW-1 Premabhai Pethabhai Harijan at Exh. 21. In his oral testimony he has stated that he resides at Fatehgadh since his birth. The said incident has taken place 17 years back. At the relevant time, his sister Shantaben became sick, therefore he went to the Doctor at Government

Hospital. Doctor Kailashchandra Jagannath Sharma was incharge of the dispensary. He has given injection and tablets to his sister. Doctor advised that some medicines were required to be purchased from the market. He has given Rs.5/- to the Doctor for supplying the Garramicin injection, tablets and medicines. He denied the presence of PW-3 Sukhlal Hemabhai Rathod and Ramjibhai Patel in Government hospital at the relevant time, who were the two panchas. Some officers came there, but in their presence no formalities were performed. His statement was not recorded. He identified the Doctor Kailashchandra Jagannath Sharma, in the Court who was sitting as the accused. He has also denied that panchnama was prepared in his presence. He was therefore declared hostile and was therefore cross-examined by the learned APP. During his cross-examination he stuck to the same version which he had stated in examination-in-chief. In the cross-examination of the learned Advocate of the defence, he had unequivocally admitted that Dr. Kailashchandra Jagannath Sharma has issued receipt for Rs.5/- which has been misplaced by him. He had also admitted that Dr. Kailashchandra Jagannath Sharma demanded Rs.5/- for supplying the

Gerramycin injection. He denied that Dr. Sharma demanded illegal gratification. On reappraisal of the evidence of this witness, one thing is very certain that he is a punter witness, he himself had not lodged the complaint. On the basis of the information received by PW-4 Ranvirsingh Vadansingh Puvar, he has arranged a trap with the help of the punter witness. He has admitted that the amount of Rs.5/- which was paid by him to the accused was not by way of illegal gratification but was for supplying the injection by the accused and in that regard the accused has also issued receipt, which has been misplaced by him. From the evidence of this witness, it has to be deduced that there was no demand or any acceptance of illegal gratification by the accused from the punter witness for supplying the injection.

12. Now this takes us to examine the evidence of PW-3 Sukhlal Hemabhai Rathod at Exh. 33, who is panch no.1. He has deposed as per the narration made in the panchnama. On reappraisal of his evidence it is seen that he was serving as a Forest Guard in Forest Office. He has also admitted that there are cases against the Forest Officers filed by the Anti Corruption Department under the Act. Both the panchas are

from the same office. According to the case of the prosecution a decoy trap was made at the residence where the accused had examined Shantaben while it is the say of this witness that Shantaben was examined in the hospital. This witness has no knowledge about the clothes he had put on and who called him to become a member of the raiding party. At the time of trap, he was not sitting near PW-1 and hence it cannot be expected that he heard the talk which took place between the accused and PW-1. Therefore, according to us this witness is a selectee of the investigating officer who has been a part of the decoy trap by the Investigating Officer from the Forest Office so that he can depose as per the sweet will of the investigating officer.

13. Now we shall examine the evidence of PW-4 Ranvirsingh Vadansingh Puvar at Exh. 37. In his oral testimony he has deposed as per narration in the complaint filed by him. He has also stated that on receipt of the secret information, he arranged the decoy trap. On reappraisal of his evidence, we have noticed that he has not entered the information about the secret information received by him, in the station diary. According to us, in a decoy trap, the investigating officer who arranged

the decoy trap must enter the secret information in station diary, otherwise, doubt is raised on the prosecution case.

14. In the case of The State of Gujarat v/s Jujarsinh Bhavansinh Vihol & Ors., 1999 (1) G.L.H. 947, a Division Bench of this Court, in which one of us (A.M.Kapadia,J) was a member, has held that; *though it was a decoy trap, the complainant not entered the information in the station diary with regard to illegal demand of gratification by accused - Such serious infirmity in prosecution case goes to the root of the prosecution case, and, therefore the acquittal is justified.*

15. Applying the principle laid down by the Division Bench of this Court in above referred to judgement, to the facts of the present case, at the cost of repetition, be it stated that Investigating Officer has not entered the secret information received by him in the station diary, which throws suspicion upon the prosecution case. Besides this, in the instant case, investigating officer has acted in triple capacity. The commonsense demands that one who organizes the trap after complaint, ought to have, after filing complaint, left the investigation to some other officer who could have arranged a trap and carried out the investigation. But in the instant case, he has

not left the investigation to any other officer who was readily available, and has tried to defend his action by stating that it is a practice that the officer who organizes the decoy trap, has to carry out the investigation. If investigation would have been carried out by some other officer, then the real truth would have come on record as to which type of information was received by PW-4 Ranvirsingh Vadansingh Purva, and for which particular Doctor he had received the information. The aforesaid infirmity goes to the root of the case and doubt is raised on the prosecution case.

16. In the case of Kanubhai Kantibhai Patel v/s The State of Gujarat, 1998(1) G.L.H. 924, the learned Single Judge of this Court has held that; *Police Officer doing everything right from recording of complaint till the charge-sheet was filed, same would be an infirmity in the case which is bound to reflect on the credibility of prosecution case, prosecution must fail on that count.*

17. Applying the principle laid down by the learned single Judge of this Court in above referred to judgement to the facts of the present case, at the risk of repetition, be it stated that since PW-4 Ranvirsingh Vadansingh Puvar, has become the complainant, carried out

the investigation and filed charge-sheet as well, which reflects on the credibility of his evidence and as a result thereof, prosecution case must fail on that count. One more infirmity we have noticed is that the authority concerned has not applied its mind before according sanction to prosecute the accused. In this connection, prosecution has examined PW-2 - Vinodbhai Laljibhai at Exh.28. On perusal of his evidence it is seen that the accused is entitled to take charge for the medicines, which were not available in the Government dispensary.

18.As per notification Exh.30, Doctors are required to keep medicines as well as injections, which are not available in the dispensaries of rural areas, and when these medicines are not available, Doctors can make them available at their cost or at the cost of the patients. Sister of the Punter witness was given injection of Gerramycin and as per letter issued by Jilla Panchayat (Exh. 43), it is seen that the said injections were not provided to Fatehgadh dispensary and, therefore, the accused was justified in recovering a sum of Rs.5/- from PW-1, punter witness for supplying the injection to him, for the purpose of treating his ailing sister Shantaben.

Therefore, according to us, the learned trial Judge is justified in recording the finding that the sanctioning authority has accorded the sanction by non-application of mind. If the Sanctioning Authority could have perused the notification at Exh.30 and 43, which in terms permit the concerned Doctor to recover the charges for medicines which were not supplied by the Government, perhaps sanction would not have been accorded.

19. On overall appreciation of the evidence of the prosecution witness, according to us, following points can be culled out:

- (i) The accused is a public servant.
- (ii) The sanction accorded by the sanctioning authority to prosecute the accused is accorded without application of mind.
- (iii) On the basis of the Notifications (Exh.30/Exh.43), the accused is entitled to receive Rs.5/- for supplying the injection, which was not supplied by the Government to the dispensary. As the accused has supplied the injection from his own money, therefore he can legitimately recover the said charge from the accused.
- (iv) The punter witness has not supported the case of the prosecution. According to us though he has been declared hostile, he is a

trustworthy witness. He has given a correct account of the role played by the accused. He has stated that the Doctor has recovered Rs.5/- for supplying the injection for treating her ailing sister Shantaben and receipt thereof has also been issued by the accused, which has been misplaced by him.

(v) Investigating officer has not cared to record the statement of the concerned officials of the Health Department with regard to the exact position prevalent at the relevant time and to find out the effect of notifications (Exh. 30 and Exh. 43).

(vi) Both the panchas were the selectee as they were selected from the same office. The ACB has filed trap case against the arraigned officers working in the same office. Therefore, panchas were under the thumb and influence of investigating officer and therefore panch no.1 deposed as per the sweet will of the investigating officer.

(vii) Investigating officer has overacted in selection of the panchas. He has selected the panchas of his own choice so that they can depose as per his sweet will. Investigating officer has acted in triple capacity. He himself has become complainant. According to us, punter witness should have filed the

complaint, but instead the investigating officer has filed complaint in the instant case.

(viii) Investigating officer has not investigated the case. The Investigating officer has not taken care to record the statement of the Health Department with regard to the notifications (Exh. 30 and Exh. 43), issued by the Jilla Panchayat, which in turn permits the concerned Doctor to recover the charges from the patients for the medicines which were supplied by them if the same were not available with them.

20. In view of the discussions made above, this Court is of the considered opinion that the prosecution has utterly failed to establish the charge levelled against the accused for the offences punishable u/s 161 of IPC and u/s 5(1) (d) read with sec. 5(2) of the Act. On the contrary, it is duly proved that the amount of Rs.5/- which is recovered from the accused by the punter was by way of charges, paid to the accused by the punter, for supplying the injection which was not available in the dispensary.

21. The learned Special Judge has committed no illegality or irregularity in coming to the conclusion that the prosecution has failed to

prove the charge against the accused. We find ourselves in complete agreement with the said finding, ultimate conclusion and resultant order of acquittal, as according to us no other conclusion is possible except the one reached by the learned Special Judge.

22.It is a cardinal principle of criminal jurisprudence that in an acquittal appeal if other view is possible then also appellate Court cannot substitute its own view by reversing the acquittal into conviction, unless the findings of the trial Court are perverse, contrary to the material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable. (See Ramesh Babulal Doshi V. State of Gujarat (1996) 9 SCC 225). In the instant case, the learned APP has not been able to point out to us as to how the findings recorded by the learned Special Judge are perverse, contrary to material on record, palpably wrong, manifestly erroneous or demonstrably unsustainable.

23.In the case of RAM KUMAR V. STATE OF HARYANA, reported in AIR 1995 SC 280, Supreme Court has held as under:

“The powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions

under Sections 378 and 379, Cr.P.C. are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal."

24. It may be noted that this is an acquittal appeal in which Court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it

would not be safe to set aside the order of acquittal, more particularly, when the evidence has not inspired confidence of the learned Special Judge.

25. On overall appreciation of evidence, this Court is satisfied that there is no infirmity in the reasons assigned by the learned Special Judge for acquitting the accused. Suffice it to say that the learned Trial Judge has given cogent and convincing reasons for acquitting the accused and the learned A.P.P. has failed to dislodge the reasons given by the learned Special Judge and convince this Court to take a view contrary to the one taken by the learned Special Judge.

26. Seen in the above context, we do not find any valid reason or justifiable ground to interfere with the impugned judgment and order passed by the learned Special Judge acquitting the accused of the offences with which he was charged. Hence, leave to appeal deserves to be refused by dismissing the Appeal in limine.

27. For the foregoing reasons, leave to appeal is refused. Appeal is dismissed at the threshold.

(A.M. Kapadia, J.)

(Abhilasha Kumari, J.)

Jayanti*